FILE COPY

FILED
FEB 26 1968

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| Summary of argument | 9 |
| Argument: | |
| I. Appellant's operations in the remote past afford no basis for issuance of a certificate | 11 |
| II. Appellant's failure to continue any operations since the "grandfather" date, other than exempt transportation, precludes issuance of a certificate | 22 |
| Conclusion | 27 |


## CITATIONS

Cases:


*Aguilines, Inc., Common Carrier Application*, 250 I. C. C. 339 — 18

*Alton R. Co.* v. *United States*, 315 U. S. 15 — 10, 15, 16, 24

*American-Hawaiian Steamship Company Common Carrier Application*, 250 I. C. C. 219 — 18

*Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248 — 20

*Barrett Line* v. *United States*, 326 U. S. 179 — 5, 9, 12, 24

*Choctaw Transportation Company Contract Carrier Application*, 250 I. C. C. 106 — 14

*Cole, Jack, Co.* v. *United States*, 41 M. C. C. 657, 59 F. Supp. 10, affirmed, 324 U. S. 822 — 14

*Great Lakes Transit Corporation Applications*, 266 I. C. C. 9 — 18

*Gregg Cartage Co.* v. *United States*, 316 U. S. 74 — 10, 14, 16, 17, 18, 19, 21, 24

*Hagerstown Storage & Transfer Application*, 32 M. C. C. 409 — 18

*Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503 — 21

*Lykes-Coastwise Line, Inc., Applications*, 260 I. C. C. 201 — 18

*McFarland & Stample Truck Company, Purchase*, 36 M. C. C. 459 — 18

*Moran Towing & Transportation Co., Inc., Application*, 260 I. C. C. 269 — 14

*Riddle Common Carrier Application*, 22 M. C. C. 204 — 18

*Riss & Co.* v. *United States*, 320 U. S. 709 — 16, 24

Page

Cases—Continued
*River Sand & Gravel Company Contract Carrier Application*, 250 I. C. C. 370 ..... 14
*Tennessee Valley Sand & Gravel Company Common Carrier Application*, 250 I. C. C. 599 ..... 14
*Thames River Line, Inc., Common Carrier Application*, 250 I. C. C. 245 ..... 14
*Turner* v. *United States*, 56 F. Supp. 798, affirmed *per curiam*, 323 U. S. 674 ..... 16, 24
*United States* v. *American Trucking Associations*, 310 U. S. 534 ..... 18
*United States* v. *Carolina Carriers Corporation*, 315 U. S. 475 ..... 15
*United States* v. *Maher*, 307 U. S. 148 ..... 10, 16, 24

Statutes:
Interstate Commerce Act:
Section 203 (b) ..... 11
Section 206 (a) ..... 17
Section 303 ..... 11
Section 303 (g) ..... 5, 12
Section 309 (a) ..... 2, 9, 10, 14, 15, 16, 17, 25
Section 309 (c) ..... 3, 27
Section 309 (f) ..... 3
~~Section 309 (g)~~ ..... ~~10~~

Miscellaneous:
86 Cong. Rec. 11768 ..... 12
Hearings, Senate Committee on Interstate Commerce, S. 2009, 76th Cong., 1st sess., pp. 193–277, 291–311, 357–374, 515–538, 661–696 ..... 11
H. Rep. No. 1217, 76th Cong., 1st sess., p. 21 ..... 12
Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess., p. 60 ..... 17
S. Rep. No. 433, 76th Cong., 1st sess., p. 4 ..... 11

# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 616

MCALLISTER LIGHTERAGE LINE, INC., APPELLANT

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK*

## BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

### OPINION BELOW

The opinion of the specially constituted district court (R. 36–43) is not reported. The report of Division 4 of the Interstate Commerce Commission, dated February 7, 1944 (R. 17–22), and its earlier report, dated July 28, 1942 (R. 13–15), are not reported.

### JURISDICTION

The final decree of the three-judge district court was entered on August 9, 1945 (R. 43). The

petition for appeal was presented and allowed on October 8, 1945 (R. 45). The jurisdiction of this Court rests on Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345). Probable jurisdiction was noted by this Court on December 10, 1945 (R. 263).

## QUESTION PRESENTED

Whether the Interstate Commerce Commission committed any error in denying appellant a certificate as a common carrier by water under the "grandfather" clause of Section 309 (a) of Part III of the Interstate Commerce Act.

## STATUTE INVOLVED

Section 309 (a) of the Interstate Commerce Act provides in pertinent part:

> Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so

> operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. * * * (49 U. S. C. 909 (a).)

**STATEMENT**

Appellant's application for a certificate as a common carrier[1] by water under the "grand-

---

[1] Appellant's original application was in the alternative, seeking a permit as a contract carrier under Section 309 (f) of the Act, but at the hearing before the Commission the application was amended by eliminating the request for a permit. Appellant also sought a certificate as a common carrier under the "public convenience and necessity" provisions of Section 309 (c) but the Commission's denial of a certificate under that Section was not challenged or involved in the suit in the district court. An application by an affiliated company, McAllister Brothers, Inc., which owns vessels and

father" clause of Section 309 (a) of Part III of the Interstate Commerce Act, as amended, was denied by Division 4 of the Interstate Commerce Commission's order of February 7, 1944 (R. 260), which confirmed and permitted to become effective its previous decision issued on July 28, 1942 (R. 16).

The Commission found that appellant "was not in operation on January 1, 1940, and continuously since as a contract or common carrier by water, in interstate or foreign commerce, in the performance of transportation subject to part III of the act" (R. 15, 22), and the application was accordingly denied.

The evidentiary facts found by the Commission with respect to appellant's operation as a water carrier show that appellant or its predecessors have been engaged in marine transportation since 1864, and the business has been continuously owned by its founder or his descendants through four generations. Appellant's activities in the past have included ocean transportation, harbor towing, freighting, salvaging, fishing, chartering, passenger excursions, and managing or operating for other companies. In the period between 1919 and 1926 appellant operated on

---

charters them to appellant, was dismissed upon the ground that no certificate or permit was required to authorize continuance of that business. The dismissal of the application of McAllister Brothers, Inc., was not challenged or involved in the suit in the district court.

behalf of the United States Shipping Board a fleet of 43 tankers to all parts of the world. (R. 20.)

However, notwithstanding the extensive scope of its operations during a past period of its history, appellant's operations since 1933 have been confined to the performance of transportation within the New York Harbor area.[2] In this connection the Commission made the following findings:

> Since 1933 applicant's operations have been confined primarily to the New York Harbor area. Some towing for other carriers and of bulk commodities has been performed from or to points outside of the harbor area but such operations are not subject to the act. In 1937 machinery, airplanes, guns and parts were carried between New York Harbor, Hudson River and Long Island Sound points but this service has not been repeated. Since January 1, 1940, applicant's fleet has been engaged almost exclusively within New York Harbor in the performance of lighterage and other work essential to the war

[2] Under Section 303 (g) of the Act, transportation in interstate commerce by water solely within the limits of a single harbor is exempt from regulations under the Act, unless the Commission finds that the national transportation policy requires regulation.

A water carrier's "grandfather" rights (other than chartering) must be based on transportation subject to regulation under the Act. See *Barrett Line* v. *United States*, 326 U.S. 179, 193.

effort. At the present time its commitments for service within the harbor are so great that it is unable to accept other traffic when offered.

Applicant contends that the interruption of its service since 1930 was due to the lack of business because of the economic depression, and later because all of its maritime equipment was, and is now, used in essential war work, which causes were beyond its control and must be considered under the mandate of section 309 (a); that at various times during the years of depression its operation was limited to 1 and 2 tugs and a few inland scows and lighters, and that there was no abandonment of its service. Under the provisions of section 309 (a) an applicant, in order to be entitled to "grandfather" rights, must show that it was in bona fide operation on January 1, 1940, and continuously since, except for interruptions of service beyond its control. The evidence of record establishes the fact that applicant for a period of over 10 years has performed only an inconsequential amount of transportation of a kind that is now subject to the act, and that it is not holding itself out at the present time to perform such transportation. Obviously, the remote operations heretofore described do not establish bona fide operations on January 1, 1940, and since. Furthermore, applicant has considerable facilities available at the present time, the use of which it voluntarily has confined to exempt trans-

> portation within the limits of New York Harbor. We affirm the conclusion of the prior report that applicant has not established that it is entitled to "grandfather" rights. (R. 20–21.)

In Exhibit E attached to the application filed May 29, 1941 (R. 55), appellant stated that it performed lighterage operations on all commodities moving within the confines of New York Harbor (R. 65).

A field report submitted by Examiners Diehl and Pitts, dated December 22, 1941, shows that with four exceptions appellant has confined its operations for the last several years to points in New York Harbor (R. 73; see R. 19). In the questionnaire returned with the application, appellant stated that it carried all commodities, but confined to New York Harbor (R. 79).

In an affidavit by James P. McAllister, appellant's vice president and treasurer (R. 88–89), the admission was contained that,

> It is impossible for this company to show any actual records of marine transportation business other than New York harbor and the above described short runs outside, thereof, for a period of 10 years prior to January 1, 1940.
>
> * * * * *
>
> Other than an occasional tow for a specific customer to points on Long Island Sound, up the Hudson River and Jersey Shore, the records of McAllister indicate

> that for an approximate ten-year period prior to 1940, all of its operations were limited to the confines of New York Harbor. (R. 89.)

Mr. McAllister testified that the company would not be in a position to take any additional business beyond that it is now handling in New York Harbor (R. 155). He testified that business slumped from 1930 until 1937, followed by another slump until 1940 (R. 156). After December 31, 1937, appellant's operations were still limited to New York Harbor (R. 157), and all movements since January 1, 1940, have been between points within New York Harbor (R. 163–164; see also Exhibit 12, R. 209–214).

The witness admitted that water-borne traffic was moving to other points between December 31, 1937, and January 1, 1940, but that the volume of business available was so far below normal that not all carriers could participate in it (R. 164). He repeated that the company was unable to take any tonnage outside of the harbor limits as "today we are running behind all the time in our work" (R. 167). Also, he testified that appellant's rate schedule applies only to New York Harbor (R. 176).

Its petition for further reconsideration (R. 250–259) having been denied by the full Commission on April 10, 1944 (R. 261), appellant on or about September 19, 1944, filed suit in the

United States District Court for the Southern District of New York to set aside the Commission's order (R. 1). The United States and the Commission filed answers (R. 9–12, 22–26), and the cause came on for hearing on April 12, 1945. On July 19, 1945, the court rendered its opinion upholding the validity of the Commission's order (R. 36–43). On August 9, 1945, final decree was entered dismissing appellant's suit (R. 43–44). The petition for appeal was presented and allowed on October 8, 1945 (R. 44–45). On December 10, 1945, this Court noted probable jurisdiction (R. 263).

## SUMMARY OF ARGUMENT

I

Appellant's proof does not furnish a basis for a "grandfather" certificate under Section 309 (a) of the Interstate Commerce Act, which establishes January 1, 1940, as the critical date for operations. The Commission found that appellant performed only exempt transportation since 1933. Such transportation, remote from the "grandfather" date or exempt from regulation, furnishes no basis for "grandfather" rights. *Barrett Line* v. *United States,* 326 U. S. 179, 193, 199–200.

The proviso of Section 309 (a), with reference to "interruptions of service over which the applicant * * * had no control," does not help appellant's case. That proviso relates only to

the requirement of continuity since the "grandfather" date and is of no avail to appellant, which was unable to furnish proof of service on the critical date. In any event, even if appellant's failure to operate on that date was the result of an economic depression, the Commission could not issue a certificate. *Gregg Cartage Co.* v. *United States,* 316 U. S. 74.

## II

The certificate was also properly denied because appellant failed to show a continuity of service since the "grandfather" date, other than exempt transportation. As in motor carrier cases, Section 309 (a) requires continuity of service since the "grandfather" date. *United States* v. *Maher,* 307 U. S. 148, 155–156; *Alton R. Co.* v. *United States,* 315 U. S. 15, 25. Because appellant voluntarily confined its operations to the performance of exempt transportation within the limits of New York Harbor (see Section 303 (g)) since the "grandfather" date, appellant's application was correctly denied.

The fact that the transportation operations appellant performed were essential war work does not prove that they were performed involuntarily. Moreover, since 1933 appellant has engaged only in exempt transportation. The facts found by the Commission reveal that appellant's failure to engage in *bona fide* operations (other than exempt transportation) since the "grandfather"

date was not due to circumstances over which appellant "had no control" (sec. 309 (a)).

## ARGUMENT

### I

### APPELLANT'S OPERATIONS IN THE REMOTE PAST AFFORD NO BASIS FOR ISSUANCE OF A CERTIFICATE

Part III was added to the Interstate Commerce Act on September 18, 1940 (54 Stat. 929), and brought water carriers within the regulatory jurisdiction of the Interstate Commerce Commission. Part III of the Act was largely patterned after Part II, dealing with the regulation of motor carriers, which had been enacted in 1935.[3] Unlike Part II, however, Part III contains numerous and extensive exemptions from regulation.[4] These exemptions are contained in Section 303 of the Act (49 U. S. C. 903). One species of exempt

[3] In view of this similarity in the legislative purpose and technique, judicial decisions interpreting the motor carrier provisions of the Act are highly persuasive. See S. Rep. No. 433, 76th Cong., 1st sess., p. 4. Such decisions are more numerous than decisions under Part III, inasmuch as Part II has been longer in effect and the carriers to which it is applicable are more numerous than those subject to Part III.

[4] No exemptions of similar commercial importance are contained in Part II. Section 203 (b) of Part II (49 U. S. C. 303 (b)) exempts only school buses, taxicabs, farm and suburban transportation, and other special types of service. The broader exemption provisions in Part III were enacted advisedly, there having been strong opposition to the regulation of water carriers. Hearings, Senate Committee on Interstate Commerce, S. 2009, 76th Cong., 1st sess., pp. 193–277, 291–311, 357–374, 515–538, 661–696.

transportation under this Section of the Act is "transportation in interstate commerce by water solely within the limits of a single harbor."[5]

This Court has held that a water carrier's "grandfather" rights (other than with respect to chartering vessels) must be based on transportation subject to regulation under the Act, and that exempt transportation is to be disregarded. *Barrett Line v. United States*, 326 U. S. 179, 193. The *Barrett Line* case likewise held that past water carrier operations prior to January 1, 1936, might be disregarded as too remote to serve as a basis for "grandfather" rights (*ibid.* 199–200).

---

[5] Section 303 (g) of the Act provides:

> Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, the provisions of this part shall not apply (1) to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not a part of a continuous through movement under a common control, management, or arrangement to or from a place without the limits of any such harbor or harbors, or (2) to transportation by small craft of not more than one hundred tons carrying capacity or not more than one hundred indicated horsepower, or to vessels carrying passengers only and equipped to carry no more than sixteen passengers, or to ferries, or to the movement by water carriers of contractors' equipment employed or to be employed in construction or repair for such water carrier, or to the operation of salvors. (49 U. S. C. 903 (g).)

For descriptions of the effect of this Section, see H. Rep. No. 1217, 76th Cong., 1st sess., p. 21; 86 Cong. Rec. 11768.

Here the Commission found that appellant has performed nothing but exempt transportation since 1933. In this connection the Commission said:

> Since 1933 applicant's operations have been confined primarily to the New York Harbor area. Some towing for other carriers and of bulk commodities has been performed from or to points outside of the harbor area but such operations are not subject to the act. In 1937 machinery, airplanes, guns and parts were carried between New York Harbor, Hudson River and Long Island Sound points but this service has not been repeated. Since January 1, 1940, applicant's fleet has been engaged almost exclusively within New York Harbor in the performance of lighterage and other work essential to the war effort. At the present time its commitments for service within the harbor are so great that it is unable to accept other traffic when offered.
>
> * * * * *
>
> The evidence of record establishes the fact that applicant for a period of over 10 years has performed only an inconsequential amount of transportation of a kind that is now subject to the act, and that it is not holding itself out at the present time to perform such transportation. Obviously the remote operations heretofore described do not establish bona fide operations on January 1, 1940, and since. (R. 20–21.)

Manifestly, the Commission would not have been justified in granting appellant a "grandfather" certificate based on operations performed more than a decade in the past, when Congress has selected January 1, 1940, as the determinative date. Section 309 (a), *supra*, pp. 2–3. To be sure, the Commission is not required to limit its view to transportation performed on a single day, but may consider operations for a reasonable period before January 1, 1940; and in this connection the Commission has adopted a more liberal attitude in the case of water carriers than of motor carriers,[6] because of the difference in the nature of the two types of transportation, and the less frequent service ordinarily rendered by water-borne craft. Nevertheless the Commission is not free to disregard entirely the specific date of Jan-

---

[6] *Moran Towing & Transportation Co., Inc., Applications*, 260 I. C. C. 269, 273. The Commission has held that shipments one year before the "grandfather" date are too remote. *Thames River Line, Inc., Common Carrier Application*, 250 I. C. C. 245, 246. Likewise, 1938 and 1937 have been held too remote, as well as 1936. *Tennessee Valley Sand & Gravel Company Common Carrier Application*, 250 I. C. C. 599, 602; *River Sand & Gravel Company Contract Carrier Application*, 250 I. C. C. 370; *Choctaw Transportation Company Contract Carrier Application*, 250 I. C. C. 106, 107. In motor carrier cases the Commission has frequently held that shipments more than a few months prior to June 1, 1935, are too remote to evidence bona fide operations on that date. See, *e. g.*, *Gregg Cartage Co.* v. *United States*, 316 U. S. 74; *Jack Cole Co.* v. *United States*, 41 M. C. C. 657, 59 F. Supp. 10 (N. D. Ala.), affirmed *per curiam*, 324 U. S. 822.

uary 1, 1940, which Congress has prescribed. It would amount to an amendment of the legislation enacted by Congress for the Commission to base "grandfather" rights on operations conducted by appellant more than 10 years ago.

Not only must the Commission disregard operations performed at a remote period in the past, but it must disregard operations which are not of a substantial character. *United States* v. *Carolina Carriers Corporation*, 315 U. S. 475, 480–1. The burden of proof rests upon the applicant. *Alton Railroad Company* v. *United States*, 315 U. S. 15, 25; *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 83. In view of the Commission's findings that appellant "for a period of over 10 years has performed only an inconsequential amount of transportation of a kind that is now subject to the act" (R. 21), it is clear that appellant's proof fell far short of that necessary in order to obtain a "grandfather" certificate under Section 309 (a) of the Act.

Appellant contends that its failure to operate on January 1, 1940, was due to conditions beyond its control arising from the economic depression of 1930, and the consequent lack of traffic; and that therefore the proviso of Section 309 (a), *supra*, pp. 2–3, with reference to "interruptions of service over which the applicant * * * had no control," becomes applicable.

In the first place, the proviso regarding interruption of service over which the applicant had

no control relates only to the requirement of continuity since the "grandfather" date. Upon the analogy of motor carrier decisions,[7] it is plain that a water carrier in order to obtain "grandfather" rights must prove not only (1) that "such carrier or a predecessor in interest was in bona fide operation as a common carrier on January 1, 1940," but also (2) that such applicant "has so operated since that time" to the date of the Commission's decision on the application, except "as to interruptions of service over which the applicant or its predecessor in interest had no control." Section 309 (a). Hence if, as here, there is no proof of service on the "grandfather" date, the applicant is not entitled to a certificate upon proof that such lack of service was due to circumstances over which applicant had no control. Only if the applicant was in *bona fide* operation on that date, but there was a subsequent interruption of service over which the applicant had no control, does the proviso warrant the Commission in granting a certificate.[8]

[7] See *United States* v. *Maher*, 307 U. S. 148, 155–156; *Alton R. Co.* v. *United States*, 315 U. S. 15, 25; *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 78; *Turner* v. *United States*, 56 F. Supp. 798 (M. D. N. C.), affirmed *per curiam*, 323 U. S. 674; *Riss & Co.* v. *United States*, 320 U. S. 769.

[8] The words "in either event" in Section 309 (a), *supra*, pp. 2–3, do not refer to operation before and after the "grandfather" date, but refer to ordinary as distinguished from seasonal operation. This is made clear by reference to the

Secondly, even if it be assumed, as appellant contends, that its failure to operate on January 1, 1940, was the result of an economic depression, the Commission would nevertheless, as a matter of law, lack power to issue a certificate to appellant in reliance upon the provision in Section 309 (a) with respect to "interruptions of service over which the applicant * * * had no control." This follows as a result of this Court's decision in *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, that bankruptcy is not to be deemed an interruption of service over which a carrier has no control. Interruptions of service owing to floods, snow, unsafe or impassable roads, highway construction, droughts which destroy a carrier's chief source of business, ill health, strikes,

---

analogous words "in either instance" in Section 206 (a) of Part II of the Act (49 U. S. C. 306 (a)), which provides:

> *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation * * *

See Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess., p. 60.

or the illegal acts of governmental authorities constitute grounds for holding that an interruption of service is beyond an applicant's "control" (see 316 U. S. at pp. 85–86, notes 1–9).* However, since bankruptcy itself is not to be deemed an interruption of service over which a carrier has no control, it would seem that *a fortiori* the avoidance of bankruptcy by prudent retrenchment of the scope of appellant's water carrier operations, following the economic de-

---

*Suspension of service in compliance with an order issued by the Office of Defense Transportation was held by the Commission to be an interruption over which applicant had no control in *Great Lakes Transit Corporation Applications*, 260 I. C. C. 9, 10. Moreover, the taking of vessels by the Government for use in the prosecution of the war has been repeatedly held to be an interruption of service beyond the control of applicant. *American-Hawaiian Steamship Company Common Carrier Application*, 250 I. C. C. 219, cited by appellant (appellant's brief in opposition, pp. 6–7). See also 250 I. C. C. 317, 319; 359, 362; 457, 462; 469, 472; 477, 479; 510, 511; 260 I. C. C. 23, 24; 74, 77; 232, 233. However, interruption of service because of a sale of vessels to the British Government was held not beyond the control of applicant. *Lykes-Coastwise Line, Inc., Applications*, 260 I. C. C. 201, 204. Moreover, voluntary discontinuance of service to a particular port is within applicant's control. *Agwilines, Inc., Common Carrier Application*, 250 I. C. C. 339, 340. The Commission has repeatedly held that loss of traffic or failure to secure profitable business are not sufficient reasons for failure to operate. *Riddle Common Carrier Application*, 22 M. C. C. 204, 206; *McFarland & Stample Trucking Company, Purchase*, 36 M. C. C. 459, 461; *Hagerstown Storage & Transfer Application*, 32 M. C. C. 409, 413. The Commission's interpretation of the statute it administers is entitled to great weight. *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

pression of 1930, must also be regarded as a voluntary course of conduct, within appellant's control, and dictated by appellant's sound business judgment. Accordingly, appellant's cessation of operations (other than exempt transportation in New York Harbor) cannot be deemed an interruption of service over which appellant "had *no* control" (italics those of the Court, 316 U. S. at p. 82).

Appellant seeks to escape the effect of the *Gregg Cartage Co.* decision by showing that there the carrier took the initiative in instituting receivership proceedings, and managed its affairs in a manner likely to provoke the filing of a petition in bankruptcy by creditors (316 U. S. at p. 81). However, the *Gregg Cartage Co.* decision was not based upon the narrow ground that the carrier itself took the first step in connection with the judicial proceedings leading to its liquidation. The decision was rested upon the broad ground that the carrier's adverse financial condition was due to circumstances over which it could not be said that the carrier had no control, namely, the choice of an insurance company which became insolvent, and the negligent operation of vehicles leading to claims for personal injuries and property damage (316 U. S. at pp. 81–82). Appellant here is contending for the same rule which was unsuccessfully urged in the *Gregg Cartage Co.* case, that "the Commission must trace out the chain of causation" and weigh the carrier's judg-

ment "against the pressures of circumstance" (316 U. S. at p. 79). The dissenters in the *Gregg Cartage Co.* case similarly understood the rule adopted by the majority of the Court to be applicable in the event of "misfortunes of a purely accidental character which affect financial stability" (316 U. S. at p. 86).

Whether a particular carrier should seek to withstand the effects of a depression by curtailing the geographical area to be served by it (rather than seeking larger volume and lower unit costs by expanding its business and seeking wider markets) is obviously a question of business judgment and managerial discretion. The exercise of such judgment and discretion cannot be treated as an event over which the carrier "had no control" (sec. 309 (a)).

The effect of the depression does not become pertinent here, as it was in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, where the level of rates was in issue, and the effect of the depression upon the revenues of the carriers was significant. Here the depression furnished the occasion for exercise of business judgment by appellant, and the impact of economic conditions upon appellant's revenues is not an issue for consideration by the Commission in order to decide the matter before it. Moreover, the *Atchison* case was an exceptional decision, standing upon its own particular facts, and has never been followed.

*Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 515.

As we have shown, the Commission's action here was correct as a matter of law, under the *Gregg Cartage Co.* decision. It was therefore not necessary for the Commission to make a finding whether or not the interruption in service before January 1, 1940, was beyond the control of petitioner. Such a finding would have been immaterial, for it would have been in substance a conclusion of law; and under the *Gregg Cartage Co.* decision the Commission was precluded, as a matter of law, from reaching a determination favorable to appellant on that issue. Even if the Commission had explicitly found as a fact that the applicant's cessation of service had been due to adverse economic conditions attendant upon the depression, under the *Gregg Cartage Co.* rule, it could not have proceeded to make the further ultimate finding desired by appellant, *viz.*, that such an interruption of service was one over which the appellant "had no control."

Appellees submit that the district court could with propriety have gone further than it did (see *infra*, p. 22), and could have upheld the Commission's denial of appellant's application upon the ground that appellant had failed to prove *bona fide* operation as a water carrier on January 1, 1940. Appellant's substantial and world-wide operations as a water carrier at a remote period in the past were insufficient to afford any basis for

the issuance by the Commission of a certificate under the "grandfather" clause of Section 309 (a) of the Act.

## II

### APPELLANT'S FAILURE TO CONTINUE ANY OPERATIONS SINCE THE "GRANDFATHER" DATE, OTHER THAN EXEMPT TRANSPORTATION, PRECLUDES ISSUANCE OF A CERTIFICATE

In any event, the Commission's order must be upheld for the reasons given in the district court's opinion. The district court placed its decision upon a wholly unassailable ground, *viz.*, lack of continuity of service following the "grandfather" date of January 1, 1940. With regard to that period of time, the findings of fact made by the Commission are definite and uncontroverted.

In that connection the district court said (R. 42–43):

> Decision, however, does not depend entirely upon what the petitioner or its predecessors did or failed to do on or before January 1, 1940. The statute requires as a condition precedent to the granting of a "grandfather" certificate, where proof is not made of bona fide operation on January 1, 1940, and since that date, a showing that the interruption of service on and after the critical date was for causes not within the control of the petitioner or its predecessors. There was no proof whatever of subsequent operation and the Commission found both that the applicant "is not holding itself out

at the present time to perform such transportation" and that it "has considerable facilities available at the present time, the use of which it voluntarily has confined to exempt transportation within the limits of New York Harbor." This makes unimportant any deficiency in the findings as to the interruption of service before January 1, 1940. We think the Commission's findings above quoted necessarily imply that the petitioner's failure to resume the interrupted service after January 1, 1940, was not due to causes beyond its control. Its only excuse for failing to perform such service during the subsequent period is that after the outbreak of World War II all its facilities were required for service in New York Harbor and that after this country was attacked they would have been requisitioned by the government for such use had the petitioner not devoted them voluntarily to that purpose.

Whether or not that is so, however, is problematical, and the fact that the petitioner made no attempt to resume the service for which the "grandfather" certificate is now sought leaves in the realm of pure speculation what the effect of such an attempt might have been by way of any requisition by the government. We feel bound to give effect to the findings made by the Commission, and when that is done, the petitioner is left short of proof and findings necessary to entitle it to a reversal of

> the order denying its application for a certificate. The informed judgment of the Commission must be given effect when based on findings which are supported by the evidence. *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282.

Unquestionably, in a water carrier application, just as in a motor carrier case, continuity of service since the "grandfather" date is essential and must be proved before an applicant is entitled to a certificate. *United States* v. *Maher,* 307 U. S. 148, 155–156; *Alton R. Co.* v. *United States,* 315 U. S. 15, 25; *Gregg Cartage Co.* v. *United States,* 316 U. S. 74, 78; *Turner* v. *United States,* 56 F. Supp. 798 (M. D. N. C.), affirmed *per curiam,* 323 U. S. 674; *Riss & Co.* v. *United States,* 320 U. S. 709.

In the light of this requirement of continuity, together with the rule that exempt transportation is to be disregarded as a basis for issuance of a "grandfather" certificate (*Barrett Line* v. *United States,* 326 U. S. 179, 193), it seems plain that appellant's application was properly denied. The Commission's findings clearly show that following the "grandfather" date of January 1, 1940, appellant has voluntarily confined its operations to the performance of exempt transportation within the limits of New York Harbor (R. 20–21).

Appellant urges that its failure to render any transportation service, other than such exempt

transportation, is an interruption of service over which it "had no control" under the proviso of Section 309 (a) inasmuch as the exempt transportation performed by appellant was work essential to the war effort. However, the fact that the transportation operations appellant performed were essential war work does not prove that they were performed involuntarily instead of as the result of appellant's choice. Much war work was done by companies which found it profitable as well as patriotic to engage in such essential activities; they did so voluntarily and without compulsion by public authority; their participation in the war effort was not a matter over which they "had no control." The same is true of appellant. Moreover, there is no warrant for assuming that only in New York Harbor could essential war work be done. Doubtless much transportation which is not exempt from regulation under the Act was equally indispensable and requisite in furtherance of the war effort. If appellant had been furnishing such essential non-exempt transportation outside New York Harbor, it would have been able to claim "grandfather" rights on the basis of such service. But when appellant voluntarily chose to confine its water carrier operations to the furnishing of exempt transportation in the harbor area, its rights cannot be augmented merely because the service rendered happened to be essential war work.

Furthermore, the invalidity of appellant's claim that the restricted scope of its service is due to wartime compulsion is clearly shown by the fact that long before the outbreak of the war, indeed ever since 1933, its substantial operations have been confined to the New York Harbor area (R. 20–21), and hence have constituted an exempt transportation service which cannot be the basis of a "grandfather" certificate.

As the district court points out (R. 42), it is entirely problematical and speculative whether the Government would or would not have requisitioned appellant's facilities for service in New York Harbor had the appellant not devoted them voluntarily to that purpose.

Admittedly, appellant's facilities were neither requisitioned nor "requested" by the Government.[10] It cannot be contended that appellant's decision to abstain from other transportation service than the exempt operation in New York Harbor was not its own voluntary act and deed. Consequently appellant's failure to engage in *bona fide* operations (other than exempt transportation) since the "grandfather" date was not a circumstance over which appellant "had no control."

Without a certificate, appellant may, of course, continue to engage in exempt transportation. Upon proof of public convenience and necessity

[10] See note 9, *supra*, p. 18.

under Section 309 (c), appellant may secure a certificate authorizing it to engage in non-exempt transportation.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

J. HOWARD MCGRATH,
*Solicitor General.*

WENDELL BERGE,
*Assistant Attorney General.*

EDWARD DUMBAULD,
WALTER J. CUMMINGS, JR.,
*Special Assistants to the Attorney General.*

DANIEL W. KNOWLTON,
*Chief Counsel,*

EDWARD M. REIDY,
*Assistant Chief Counsel,*
*Interstate Commerce Commission.*

FEBRUARY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

# SUPREME COURT OF THE UNITED STATES.

No. 616.—October Term, 1945.

| | |
|---|---|
| McAllister Lighterage Line, Inc., Appellant, *vs.* United States of America and Interstate Commerce Commission. | On Appeal from the District Court of the United States for the Southern District of New York. |

[March 25, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

The appellant applied to the Interstate Commerce Commission for a certificate as a common carrier by water under the "grandfather" clause of Section 309(a) of Part III of the Interstate Commerce Act.[1] The authority sought was to continue a transportation service by tug and barge which appellant had performed at one time over routes along the Atlantic seaboard and certain inland waterways. The application was denied by the Commission. A specially-constituted District Court upheld the Commission's order, dismissing appellant's suit to set the order aside. The case comes to us by direct appeal from the District Court.

Under Section 309(a) appellant was entitled to a certificate without proof of public convenience or necessity if it could demonstrate that it or its predecessor in interest "was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control."

The undisputed evidence submitted to the Commission revealed that appellant or its predecessors have been engaged in marine transportation since 1864 and that the business has been continuously owned by its founder or his descendants through four generations. Past activities have been extensive and varied and have

[1] 49 U. S. C. § 909(a).

included the freight services forming the subject matter of the application in issue.

Appellant conceded before the Commission, however, that from 1933 through 1939 its freight operations virtually ceased[2] and that its activities were confined primarily to operations in the New York harbor area which were of a type exempt from regulation under the Interstate Commerce Act.[3] Appellant claimed that it had bent every effort during these years to obtain freight customers and that the paucity of its operations resulted solely from the severe economic depression which prevailed during that period. It was argued that this interruption in freight service prior to January 1, 1940, was due to factors beyond appellant's control within the meaning of the proviso of Section 309(a), preventing a forfeiture of its "grandfather" rights.

Since January 1, 1940, appellant's fleet has been engaged almost exclusively within the New York harbor in the performance of lighterage and other work essential to the war effort. So great were its commitments for service within the harbor that it has been unable to accept other traffic when offered. Appellant's claim was that this diversion of its vessels to war work after January 1, 1940, was also an interruption in regular service beyond its control, further preventing a forfeiture of "grandfather" rights under Section 309(a).

Appellant thus admitted before the Commission that it was not entitled to a certificate under the "grandfather" clause unless the business depression and the war service constituted complete and involuntary interruptions in its regular freight service, thereby bringing the proviso of Section 309(a) into operation. After reviewing the evidence, the Commission made the following conclusions: "The evidence of record establishes the fact that applicant for a period of over ten years has performed only an inconsequential amount of transportation of a kind that is now subject to the act and that it is not holding itself out at the present time to perform such transportation. Obviously the remote operations

[2] In 1937 machinery, airplanes, guns and parts were carried between New York harbor, Hudson River and Long Island Sound points but this service has not been repeated.

[3] Under Section 303(g) of the Act, transportation in interstate commerce by water solely within the limits of a single harbor is exempt from regulations under the Act, unless the Commission finds that the national transportation policy requires regulation.

heretofore described do not establish bona fide operations on January 1, 1940, and since. Furthermore, applicant has considerable facilities available at the present time, the use of which it voluntarily has confined to exempt transportation within the limits of New York Harbor. We affirm the conclusion of the prior report that applicant has not established that it is entitled to 'grandfather' rights."

The District Court held that the Commission failed to make sufficiently definite findings that the interruption in service on or prior to January 1, 1940, either was or was not beyond the control of appellant and its predecessors. The Commission merely found the admitted fact that appellant did not perform a sufficient amount of bona fide operations on or prior to the crucial date. The District Court felt that if that finding were the sole basis of the Commission's action, there would be merit to appellant's contention that the case should be remanded to the Commission for a clarification of its findings. But this assumes that the proviso of Section 309 (a) regarding interruption of service over which the applicant had no control relates to the service "on January 1, 1940," as well as to the service subsequent to that date. The Government contends, however, that the proviso refers only to the latter service and that if there is no proof of service on the "grandfather" date the applicant is not entitled to a certificate upon proof that such lack of service was due to circumstances beyond the applicant's control. Under this view the Commission's failure to make adequate findings as to interruption of service prior to January 1, 1940, becomes immaterial.

We deem it unnecessary at this time, however, to settle this problem of statutory construction, it being clear in any event that the proviso is applicable to interruptions after January 1, 1940. Failure to prove that such an interruption was beyond the applicant's control leads to a forfeiture of "grandfather" rights. As to that issue we agree with the District Court that the Commission made adequate findings that appellant failed to show continuity of service subsequent to January 1, 1940, and that there was no recognizable excuse for the lack of service. The Commission expressly found that appellant "is not holding itself out at the present time to perform such transportation" and that it "has considerable facilities available at the present time, the use of which it voluntarily has confined to ex-

empt transportation within the limits of New York Harbor." This clearly means that, in the Commission's view, the war emergency did not compel appellant to restrict its activities to exempt operations in the harbor area, thereby making the proviso of Section 309(a) inapplicable. That conclusion, we believe, is amply supported by the evidence and contravenes no statutory rule.

There was no evidence before the Commission that appellant's war work was other than voluntary in character. Appellant conceded the lack of any governmental order restricting its activities solely to the New York harbor area or prohibiting it from operating over the routes it now seeks to ply.[4] The major claim, without supporting evidence, was that the traffic in the New York harbor was so great during the war as to necessitate intensive utilization of every available tug, barge, lighter and scow in the movement of war cargoes. It was also alleged without proof that the Office of Defense Transportation beyond "the slightest doubt" would have frustrated any attempt by appellant to utilize a substantial portion of its fleet in freight service along the Atlantic coast and, if necessary, would have requested the War Shipping Administration to requisition appellant's vessels.[5] The speculative and insubstantial nature of these unsupported claims is obvious. They rest upon the questionable assumption that essential war work could be done only in the New York harbor and that there was no essential transportation service along the Atlantic coast or inland waterways in which appellant could have participated. They require one to guess what action governmental agencies would have taken under hypothetical situations. We do not imply, of course, that such claims are untrue or that

[4] Cf. American-Hawaiian Steamship Company Common Carrier Application, 250 I. C. C. 214, 222; Bull Steamship Line Common Carrier Application, 250 I. C. C. 317, 313; Isthmian Steamship Company Common Carrier Application, 250 I. C. C. 359, 362; Southern Pacific Company Common Carrier Application, 250 I. C. C. 457, 462; Coast Transportation Co., Inc., Common and Contract Carrier Application, 250 I. C. C. 469, 472; Weyerhaeuser Steamship Co. Common Carrier Application, 250 I. C. C. 477, 479; American Range Lines, Inc., Contract Carrier Application, 250 I. C. C. 510, 511; Great Lakes Transit Corporation Applications, 260 I. C. C. 9, 10; Providence Steamboat Company Contract Carrier Application, 260 I. C. C. 23, 24; St. Johns River Line Co. Common Carrier Application, 260 I. C. C. 74, 77; Nicholson Transit Co. Contract Carrier Application, 260 I. C. C. 232, 233.

[5] Appellant pointed out that the Government exerted control over all domestic shipping during the war. The Office of Defense Transportation, for example confined barge movements along the Atlantic coast largely to the movement of coal.

proved, they might not adequately support appellant's position. But there is nothing in this record to substantiate the claims. Certainly an administrative order should be grounded upon something more definite and substantial than the surmises offered by appellant.

Appellant's activities had been confined to the New York harbor area since 1933, long before the outbreak of the war. In the absence of any attempt to expand the activities and in the absence of proof of any governmental restriction, it was reasonable to find that appellant voluntarily chose to continue its activities on a limited scale. Such a choice may well have been dictated by considerations of profit and convenience. That these limited activities coincided with war time needs does not necessarily prove that they were other than voluntary in nature. Much activity in recent years furthered the war effort although it was profitable and although it was done without compulsion by public authority.

The Commission was therefore justified in concluding that appellant's failure to engage in bona fide operations since January 1, 1940, was due to circumstances other than those over which appellant had no control. Appellant accordingly forfeited whatever "grandfather" rights it might have had.

*Affirmed.*

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE dissent.

Mr. Justice JACKSON took no part in the consideration or decision of this case.